

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs August 15, 2006

**STATE OF TENNESSEE v. THOMAS MATTHEW LOVETT**

**Direct Appeal from the Circuit Court for Blount County**  
**No. C-15552     D. Kelly Thomas, Jr., Judge**

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**No. E2005-02758-CCA-R3-CD - Filed November 6, 2006**

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The defendant, Thomas Matthew Lovett, pled guilty to vandalism over \$10,000, a Class C felony, and was sentenced as a Range I, standard offender to three years, with six months to be served in the county jail and the balance on probation. On appeal, he argues that the trial court erred by denying full probation. Following our review, we affirm the judgment of the trial court and remand for entry of a corrected judgment to reflect that the defendant's sentence is to be served in the county jail rather than the Department of Correction.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed and  
Remanded for Entry of a Corrected Judgment**

ALAN E. GLENN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, J., and J.S. DANIEL, SR. J., joined.

J. Liddell Kirk, Knoxville, Tennessee (on appeal), and Stacey Nordquist, Assistant Public Defender, Maryville, Tennessee (at trial), for the appellant, Thomas Matthew Lovett.

Paul G. Summers, Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Rocky H. Young, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

As the record on appeal does not include a transcript of the defendant's submission hearing but does include one of his sentencing hearing, the following factual background is based on testimony presented at the sentencing hearing. At the hearing, the twenty-two-year-old defendant testified about the night of May 7, 2005, when he and four other young men caused approximately \$11,407 worth of damage to the La Lupita Store in Blount County. He said that, on the night of the incident, he and four acquaintances, Robert Cushman, Jacob Reynolds, Matthew Green, and Dennis

Denson, Jr., had been drinking alcohol and smoking marijuana at Cushman's house. When the group left Cushman's house around 1:30 a.m., Cushman brought two or three cans of spray paint with him and someone else brought an axe handle. Asked where they had planned to go, the defendant answered, "We didn't really have a destination. Just out riding around. . . . Friends' house, girls, something. Just something to get into. Because we were sitting around bored." The defendant acknowledged that while he was driving the group around before they went to the La Lupita Store, someone in the backseat smashed some mailboxes by "hanging something out the window."

Regarding whose idea it was to vandalize the store, the defendant testified that as they drove by it, either Cushman, Reynolds, or Green yelled from the backseat, "Let's go mess up that store, you know, 'F' the Mexicans, this and that." He said that "everybody just agreed to it," and he parked the car about fifty yards from the store. At the store, the defendant broke out a car window with the axe handle and threw a rock through a side door. The defendant said he saw Cushman taint the meat inside the store's freezer and spray-paint a swastika on the back door. The defendant denied that the store being Mexican-owned had anything to do with his decision to participate in the vandalism. Asked why he participated, the defendant responded that he had been "hanging out with the wrong people and [had] been drinking that night and made a couple of wrong decisions."

As to why he should be given probation, the defendant said it would "[s]ort of turn my life around. . . . I've stayed away from all the drugs and all that, and . . . I'd just like another chance." Regarding his marijuana usage, the defendant testified that at the time of the vandalism, he was smoking marijuana "[a]t least every other day, if not every day." He said he believed he had a drug problem and still thought about marijuana "at least 30 times a day."

Acknowledging that he had not paid any restitution for the damage to the store, the defendant added that he was currently working as a leaf collector, earning \$8.00 an hour, and that he lived with his girlfriend's family rent-free. On cross-examination, he acknowledged that after the incident, he had been working at another job, earning \$70.00 a day plus tips, and that other than a biweekly car payment, his biggest monthly expense was gasoline. After further questioning as to why he had not been able to pay restitution, he stated that he had to pay for his car to be repaired "a couple of times." The defendant's testimony further revealed that he had been convicted of misdemeanor vandalism one year earlier. He said that the prior offense involved breaking the windows out of a car and that he had paid full restitution to the owner.

Detective Brian Frazier of the Blount County Sheriff's Department testified that when he questioned the defendant, the defendant admitted his involvement in the vandalism, was "honest and forthcoming in his statements," and was remorseful about what he had done. Detective Frazier confirmed that he told the defendant he would testify on his behalf.

At the conclusion of the hearing, the trial court sentenced the defendant to three years and ordered that six months be served in the county jail<sup>1</sup> with the balance on probation. The court also made regular payments for restitution and court costs a condition of the defendant's probation. See Tenn. Code Ann. § 40-35-304(a) (2003).

### ANALYSIS

In the present appeal, the defendant argues that the trial court erroneously denied full probation. Specifically, he asserts that the trial court erred: (1) by finding that the defendant had a long history of criminal acts based on his marijuana use; (2) by considering the defendant's failure to save money for restitution before his sentencing hearing as evidence weighing against his likelihood for rehabilitation; and (3) by finding that full probation would depreciate the seriousness of the offense.

When reviewing the denial of probation, this court conducts a *de novo* review on the record, "with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d) (2003) (amended 2005).<sup>2</sup> The presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). Additionally, if appellate review

"reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result."

State v. Hooper, 29 S.W.3d 1, 5 (Tenn. 2000) (quoting State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991)). As it is apparent from our review of the record on appeal that the trial court considered the appropriate principles of sentencing, the arguments of counsel, and evidence presented at the sentencing hearing before imposing a lawful sentence, the presumption that the determinations made by the trial court are correct applies in the present case.

A defendant shall be eligible for probation, subject to certain exceptions, if the sentence imposed upon the defendant is eight years or less. Tenn. Code Ann. § 40-35-303(a) (2003)

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<sup>1</sup>The trial court intended the defendant to serve the six-month confinement period in the county jail, but the judgment form states that it is to be served in the Department of Correction.

<sup>2</sup>We cite to the 2003 codification of the Tennessee Criminal Sentencing Reform Act of 1989 because it is the law properly applied to the defendant. See 2005 Tenn. Pub. Acts ch. 353, § 18. The defendant could have elected to be sentenced under the 2005 Act because he was sentenced after June 7, 2005, for a crime he committed between July 1, 1982 and June 7, 2005. See id. As the defendant did not so elect, the 2003 codification governs. See id. However, we note substantial changes that came with the 2005 amendment.

(amended 2005).<sup>3</sup> Even if eligible however, the defendant is not automatically entitled to probation as a matter of law. See Tenn. Code Ann. § 40-35-303(b) (2003) (amended 2005). The burden is on the defendant to show the denial of probation was improper. See State v. Summers, 159 S.W.3d 586, 599–600 (Tenn. Crim. App. 2004); see also Tenn. Code Ann. § 40-35-303(b) (2003) (amended 2005).

Moreover, to meet the burden of establishing suitability for full probation, the defendant “must demonstrate that probation will ‘subserve the ends of justice and the best interest of both the public and the defendant.’” State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996) (quoting State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995), overruled on other grounds by Hooper, 29 S.W.3d at 9-10). This burden is still on the defendant even if he is entitled to the presumption that he is a favorable candidate for alternative sentencing options. State v. Blackhurst, 70 S.W.3d 88, 95-96 (Tenn. Crim. App. 2001) (citations omitted); see also Tenn. Code Ann. § 40-35-102(5)-(6) (2003) (amended 2005).

There is no bright line rule for determining when a defendant should be granted probation. Bingham, 910 S.W.2d at 456. Every sentencing decision necessarily requires a case-by-case analysis. Id. Factors to be considered include the circumstances surrounding the offense, the defendant’s criminal record, the defendant’s social history and present condition, the need for deterrence, and the best interest of the defendant and the public. State v. Goode, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997); see also Tenn. Code Ann. § 40-35-103(1)(A) (2003) (amended 2005). Another appropriate factor for a trial court to consider in determining whether to grant probation is a defendant’s credibility or lack thereof, as this reflects on the defendant’s potential for rehabilitation. Goode, 956 S.W.2d at 527. Also relevant is whether a sentence of probation would unduly depreciate the seriousness of the offense, see Tenn. Code Ann. § 40-35-103(1)(B) (2003) (amended 2005); State v. Davis, 940 S.W.2d 558, 559 (Tenn. 1997), and whether “[m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.” Tenn. Code Ann. § 40-35-103(1)(C) (2003) (amended 2005).

In sentencing the defendant, the trial court applied three mitigating factors: (1) the offense did not cause any bodily injury, Tenn. Code Ann. § 40-35-113(1) (2003); (2) the defendant gave helpful information about the involvement of other people, Tenn. Code Ann. § 40-35-113(9) (2003); and (3) the defendant admitted his involvement, Tenn. Code Ann. § 40-35-113(13) (2003). As to enhancement factors, the court found the defendant had not accepted responsibility for the crime, had not started saving money for restitution, and was not truthful in his testimony:

By way of enhancement, you’ve got a long history of criminal acts, that being illegal drug use. And you were involved in a crime, before this one occurred, on this very night. And, in spite of that, continued on in this. I think your likelihood of rehabilitation is so-so. It’s not extremely good and not extremely bad. The reason

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<sup>3</sup>The 2005 amendment increased the maximum sentence length a defendant can receive and still be eligible for probation from eight to ten years. See Tenn. Code Ann. § 40-35-303(a) (Supp. 2005).

I say that is, taking responsibility for it is one thing. Going so far as to save up some money to pay on restitution during the last five months is something else.

And being truthful about what you did is good, but you were less than forthcoming with me about what was in everybody's mind when you all left there. I don't believe for a minute that you thought nothing about somebody bringing a can of spray paint with them at 1:30 in the morning and that nobody had any kind of plans for the use of that. I'm not buying that. So, your truthfulness is a little bit compromised by that.

The trial court then stated that it did not "bode well" that the defendant had just completed his probationary sentence for the previous misdemeanor vandalism conviction in February 2005 and then committed the present offense three months later. See Tenn. Code Ann. § 40-35-103(1)(C) (2003). The court also found that the seriousness of the offense would be depreciated if the defendant did not serve any jail time because, based on the nature of his prior conviction, the defendant knew how vandalism affects its victims and participated anyway. See Tenn. Code Ann. § 40-35-103(1)(B) (2003).

The defendant initially asserts that he was entitled to the presumption that he is a favorable candidate for alternative sentencing pursuant to Tennessee Code Annotated section 40-35-102(6) (2003) and contends that "there is not a sufficient basis to overcome the statutory presumption of favorability [sic] for alternative sentencing, or to justify a sentence of confinement."<sup>4</sup>

Our supreme court recently stated that "[t]his statutory presumption of alternative sentencing is not conclusive, however, and the presumption may be rebutted by '*evidence to the contrary*'" and noted that a provision of another sentencing statute, Tenn. Code Ann. § 40-35-103(1)(A)-(C), provides "[g]uidance as to what may constitute '*evidence to the contrary*'— or evidence that the defendant is a member of the population for whom incarceration is a priority." Hooper, 29 S.W.3d at 5. This provision provides that a sentence of confinement may be imposed when "[m]easures less restrictive than confinement have frequently *or recently* been applied unsuccessfully to the defendant." Tenn. Code Ann. § 40-35-103(1)(C) (2003) (amended 2005) (emphasis added). As the trial court noted, the defendant had completed his probationary period for a previous vandalism offense only three months before committing this offense. We conclude that he was not entitled to the alternative sentencing presumption.

The defendant also argues that the trial court erred by considering his marijuana use as constituting a "long history of criminal acts," stating that "[m]ultiple instances of smoking marijuana cannot reasonably justify" that finding. He provides no legal authorities for this distinction. Accordingly, it is waived. See Tenn. Ct. Crim. App. R. 10(b).

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<sup>4</sup>Tennessee Code Annotated section 40-35-102(6) states in relevant part that a defendant convicted of a Class C felony and sentenced as a standard offender, who does not meet the criteria set out in section 40-35-102(5), "is presumed to be a favorable candidate for alternative sentencing options *in the absence of evidence to the contrary.*"

The defendant argues that the trial court erred by considering the fact that he had not saved any money for restitution by his sentencing date weighed against his likelihood for rehabilitation and that the trial court erroneously concluded that a probationary sentence would depreciate the seriousness of the offense because the defendant had a prior misdemeanor vandalism conviction. As did the trial court, we disagree with these arguments. The record fully supports the determination of the trial court that the defendant was a poor candidate for rehabilitation and should be incarcerated for a portion of his sentence.

### **CONCLUSION**

Based on the foregoing authorities and reasoning, we affirm the judgment of the trial court and remand for entry of a corrected judgment to reflect that the defendant's sentence is to be served in the county jail.

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ALAN E. GLENN, JUDGE